

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)

Docket No. 21-CRB-0001-PR
(2023-2027)

**GOOGLE’S MOTION TO ACCESS AND TO MAKE USE OF RESTRICTED
WEBCASTING V EXPERT MATERIALS AND TRIAL EXHIBITS**

Under 17 U.S.C. § 801(c), Google LLC (“Google”) requests that the Judges allow its outside counsel and experts full access to and use of the restricted versions of the following materials from the *Webcasting V* record: (1) the written, deposition, and trial testimony of economic experts Jon Orszag, Carl Shapiro, and Steven Peterson; (2) the appendices and exhibits to the testimony of all three of those experts, excluding agreements between the record labels and non-*Webcasting V* participants; and (3) trial exhibits 4104 and 4105, to the extent not already captured in the two prior requests (together, the “*Webcasting V* Materials”).¹ The requested relief is opposed.²

¹ The request excludes any restricted information of any member of the National Association of Broadcasters (“NAB”), although this exclusion is without prejudice to the ability of the Services or Copyright Owners to request access to that information in the future. NAB has agreed to create versions of the *Webcasting V* Materials that redact that information within 24 hours of the entry of the Judges’ order granting this motion.

² As indicated in the Services’ Unopposed Motion to Access and To Make Use of Restricted *Webcasting V* Expert Materials and Trial Exhibits (*Phonorecords IV*, Dkt. No. 21-CRB-0001-PR (2023-2027) (Aug. 30, 2021) (“Other Services’ Unopposed Motion”)), the Services conferred with the other participants in this proceeding eligible to review restricted information as well as the participants in *Webcasting V*. SoundExchange and the record labels that are participants in *Webcasting V* and *Phonorecords IV* have opposed access to and use of the materials by Google unless Google agrees to the screening restrictions whose propriety is presently pending a decision by the Judges. See Services’ Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future

Google agrees that use of these materials would be subject to the *Phonorecords IV* and *Webcasting V* Protective Orders.³ To that end, the restricted *Webcasting V* Materials would be treated as “Restricted” under both Protective Orders and may be used only by outside counsel and experts in this proceeding.

On August 30, 2021, Amazon.com Services LLC, Pandora Media, LLC, Apple Inc., and Spotify USA Inc. (collectively, the “Other Services”) filed an unopposed motion requesting that the Judges allow their outside counsel and experts full access to and use of the restricted versions of the *Webcasting V* Materials. *See* Other Services’ Unopposed Motion.

The Other Services agreed to SoundExchange’s request that their access to and use of the *Webcasting V* Materials would be subject to the screening restrictions to which they stipulated, and that the Judges imposed, in connection with their prior request for access to and use of the *Webcasting V* decisions. *See* Order Granting in Part Services’ Motion for Access to Restricted *Web V* Materials, Docket Nos. 19-CRB-0005-WR & 21-CRB-0001-PR (Aug. 9, 2021). Under these screening restrictions:

Individuals who would otherwise be permitted to review the *Web V* materials under the Protective Orders entered in *Phonorecords IV* and *Web V* but who are involved on behalf of digital music services in negotiating license agreements with sound recording companies shall not be permitted under this order to review restricted information concerning record company bargaining objectives, bargaining strategy, perceptions of bargaining power, or other similar information contained in the *Web V* materials (collectively, Licensing Information).

Substantive Rulings, *Phonorecords IV*, Dkt. No. 21-CRB-0001-PR (2023-2027) (July 16, 2021) (“Original Motion”); Google’s Reply in Support of Services’ Motion to Access and to Make Use of the Restricted *Webcasting V* Initial Determination and Future Substantive Rulings, *Phonorecords IV*, Dkt. No. 21-CRB-0001-PR (2023-2027) (August 6, 2021) (“Original Reply”). As discussed in Google’s Original Reply, Google is prejudiced by such screening restrictions. *See* Original Reply, §§ III-IV.

³ In the event of a conflict between the protective orders, the more restrictive provision will govern.

Id. at 2.

Google joins the Other Services’ request for access to the *Webcasting V* Materials, but does not agree to the screening conditions that the Other Services have accepted because those screening conditions are prejudicial, unfair, and arbitrary. Google therefore files this Motion separately.

ARGUMENT

I. The *Webcasting V* Materials Are Relevant To This Proceeding

The *Webcasting V* Materials are highly relevant to the *Phonorecords IV* proceeding. Google incorporates by reference the Services’ Original Motion, Section II of Google’s Original Reply, and the unredacted⁴ portions of Section I of the Other Services’ Unopposed Motion, as if fully set forth herein.

II. The Judges’ Precedents Support the Services’ Request

The Judges have previously granted similar requests to use in one proceeding restricted evidence from a prior proceeding. Google incorporates by reference the Services’ Original Motion and the unredacted portions of Section II of the Other Services’ Unopposed Motion, as if fully set forth herein.⁵

III. The Screening Restrictions Are Prejudicial, Unfair, and Arbitrary

SoundExchange’s proposed screening restrictions are extreme and unwarranted. Forcing Google’s primary outside counsel to use redacted versions of the *Webcasting V* ruling and underlying expert reports severely undermines the ability of outside counsel to zealously represent its interests in this proceeding. While the redacted public version of the *Webcasting V* ruling is

⁴ Google has access to only the redacted version of the Other Services’ Unopposed Motion.

⁵ Trial exhibits 4104 and 4105 presumably are covered by Google’s request for the expert materials—Dr. Peterson’s materials, in particular. However, out of an abundance of caution, Google requests these exhibits separately.

now available, the extent of the redactions makes it impossible to discern the record facts or the Judges' reasoning, let alone to apply its holdings to this proceeding.

Placing Spotify's royalty revenues in the context of two Majors' internal contract renewal discussions, SoundExchange relies on the testimony of two witnesses, for Sony and Warner respectively.²⁵ First, according to the Sony witness, the [REDACTED] [REDACTED] 9/2/20 Tr. 5228 (Piibe); Trial Ex. 5467 at 1. Moreover, Sony believed that Spotify was [REDACTED] 9/2/20 Tr. 5368 (Piibe).

Second, Warner also emphasized the impact of [REDACTED]. In its internal documents discussing negotiations with Spotify, Warner executives expressed the importance of [REDACTED], with one executive stating: "[REDACTED]" Trial Ex. 4025 at 1. However, the Services point out that, in the very same document, Warner executives were also emphasizing that [REDACTED] and that Warner [REDACTED] Trial Ex. 4025 at 1.²⁶

Moreover, although the internal [REDACTED] deliberations summarized in Trial Ex. 4025 reference the [REDACTED], the recitation of that latter point is not economically relevant, let alone dispositive. Internal business documents that reflect information such as historical revenue or other accounting data but ignore crucial economic information regarding, for example, the fluidity of market shares, the elasticity of market demand, and the absence of barriers to entry, are not only lacking in economic relevancy, they obscure the identification of relevant economic evidence. See Geoffrey A. Manne & E.

²⁵ The Judges discuss the separate negotiations between Spotify and the three Majors in detail *infra*.

²⁶ As the Judges discuss in greater detail *infra*, the interest Warner (or either of the other Majors) had in [REDACTED] is the only economically credible rationale for [REDACTED]

md/kw [Redacted] Initial Determination of Rates and Terms
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Initial Determination (Redacted Version) at 15, *Webcasting V*, Dkt. No. 19-CRB-0005-WR (2023-2027).

As discussed in Google's Original Reply, there is no valid basis for the prejudicial, unfair, and arbitrary restrictions demanded by SoundExchange. Google incorporates by reference Sections III and IV of its Original Reply, as if fully set forth herein.

CONCLUSION

Google requests that the Judges promptly grant this motion and rule that it may have access to and use the restricted *Webcasting V* Materials in this proceeding, subject to the *Phonorecords IV* and *Webcasting V* Protective Orders.

The deadline for the *Phonorecords IV* participants to submit their direct cases is rapidly approaching. Google's counsel and its experts require sufficient time to analyze the *Webcasting V* Materials and address them as appropriate in Google's direct statement. All of the other participants in this proceeding, besides Google, have had access to the restricted *Webcasting V* Initial Determination for 24 days while Google has gone without. And absent prompt rulings from the Judges on this motion and the Original Motion, which remains pending as to Google, the other participants will gain an even more favorable and unfair advantage over Google because they will have access to the requested *Webcasting V* expert materials and trial exhibits that Google does not. For at least these reasons, the Judges should grant this motion as promptly as reasonably possible.

September 2, 2021

Respectfully submitted,

/s/ Lisa D. Zang

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Proof of Delivery

I hereby certify that on Thursday, September 02, 2021, I provided a true and correct copy of the Google's Motion to Access and to Make Use of Restricted Webcasting V Expert Materials and Trial Exhibits to the following:

Pandora Media, LLC, represented by Benjamin E. Marks, served via ESERVICE at benjamin.marks@weil.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

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Signed: /s/ Lisa Zang